We decide to authorize any licenses based on the dismissed applications on a secondary basis to LMDS, so that such 31 GHz licensees may not interfere with LMDS and must accept any interference from LMDS. As noted, we have considered the concerns of CellularVision and TI about potential interference with LMDS operations. Under a license that is secondary to LMDS licenses, the licensees are prevented from adversely impacting LMDS and are required to modify their systems to eliminate interference or seek alternative access to frequencies. As we conclude, it is in the public interest to allow these important traffic control facilities to continue to operate as long as they do not interfere with future LMDS operations. In addition, the new licensees may provide service to the full extent permitted under the license, but are not permitted any expansion or increase in operations, further minimizing any impact of the new 31 GHz services on LMDS.

Thus, we decline to grant Sierra's request to accord the new licensees the same interference protection against LMDS that we adopted in the *Second Report and Order* for non-LTTS licensees in the outer 150 MHz segment of the 31 GHz band. That protection was based on the needs of existing 31 GHz licensees that had well-established traffic control systems or private business services that were licensed before LMDS was designated for the band, circumstances which do not apply here. Moreover, Nevada DOT requests that the dismissed applications, including the considerable number of its own and those of the Cities, be subject to secondary status to LMDS to accommodate LMDS concerns and facilitate the authorization of the dismissed applications in light of the redesignation of the band for LMDS. On balance, permitting the licensing of the limited operations requested in the few dismissed applications on a secondary basis to LMDS will prevent the undue economic hardships to small entities that seek to implement the proposed services, while preventing any chilling effect on the potential development of LMDS in 31 GHz by new LMDS licensees that are small entities.

## VI. Report to Congress

We will send a copy of this Supplementary Final Regulatory Flexibility Analysis, along with the Third Order on Reconsideration, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the Third Order on Reconsideration and this SFRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy for the Small Business Administration.

## SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

*Re: Local Multipoint Distribution Service. Third Order on Reconsideration*

Today, the Commission takes another important step toward the auctioning and licensing of LMDS. I strongly support this effort. LMDS will offer more capacity than is currently available from existing wireless providers and has the potential to provide facilities-based competition in the provision of multi-channel video programming and local exchange service,[1] two service sectors which lack robust competition.

Because of my concern about the state of competition in the service sectors that are likely to be affected by our licensing of LMDS, I write separately to indicate my support for the Commission's stated commitment to enforce strictly our real-party-in-interest rules and our rules barring unauthorized transfers of control. Strict enforcement of these rules is especially important during the period we restrict incumbent LECs and cable operators from owning in-region LMDS licenses. I also write to emphasize my support for the commitment we make in this Order to conduct a general review of our attribution rules later this year.

The Commission indicated in the *Second Report & Order* that "open eligibility [would] impede substantially the pro-competitive benefits of licensing LMDS."[2] The Commission found "on balance that a policy favoring restricted eligibility for a limited time would result in the greatest likelihood of increased competition in the local telephony and [multichannel video programming distribution] markets."[3] I support this approach and am committed to ensuring that the eligibility restriction is a meaningful one which promotes competition. And although a reluctance to change rules concerning important financing arrangements in the middle of the game is a significant factor weighing against modifying the attribution rules applicable to the eligibility restriction at this time, I am concerned that the Commission's decision not to make attributable certain interests, such as debt and warrants, convertible debentures, options, and other instruments with rights of conversion, exposes us to the danger that the effectiveness of the eligibility restrictions we have imposed could be undercut by financing arrangements involving those instruments. Because we are now on the eve of the LMDS auction, it is appropriate to leave our attribution rules in place for now. However, we should consider whether the financial instruments discussed above afford their holders influence sufficient to be captured by our rules

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[1] *See* Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report & Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) *(Second Report & Order)*.

[2] *Id.* at 12616, ¶ 161.

[3] *Id.* at 12616-17, ¶ 162.

in the future.

A key basis for the Commission's decision to impose eligibility restrictions in the case of incumbent LECs and incumbent cable companies was its conclusion that "both incumbent LECs and cable television firms currently possess substantial market power."[4] The Commission determined that "a dominant firm has the incentive to expend resources to perpetuate the status quo,"[5] that this incentive is "particularly compelling here because of the unusually large size of the LMDS spectrum allocation,"[6] and that the monopolist has a greater incentive to preempt than an entrant has to enter.[7]

Because of their desire to preserve their dominant market positions, I believe in-region LECs and cable companies have a strong incentive to acquire interests with rights of conversion to voting interests in LMDS licensees operating in their regions, with the objective of influencing the operations of those licensees so as to forestall rigorous competition. New businesses and start-up companies, such as those participating in our LMDS auction, often offer the financial instruments at issue in exchange for financing and loans on terms more favorable than are otherwise available from institutional lenders. As a holder of such instruments, an incumbent would typically have the authority to review, and perhaps approve or veto major changes in, business plans that include payment schedules and pricing plans, among other things. If such interests are not treated as attributable prior to their conversion, we run the risk of allowing the incumbents with market power to exert far more influence over the business decisions and operations of LMDS licensees than they could by merely holding voting equity in the licensee in an amount consistent with our twenty percent threshold for attribution.[8]

Because our rules allow in-region cable operators and LECs to hold up to twenty percent of the voting equity in LMDS licensees without triggering attribution, our decision not to make instruments with rights of conversion attributable gives incumbents a considerable amount of flexibility to influence the operations of LMDS licensees. If, for example, an incumbent holds a twenty percent ownership interest and, in exchange for financing an LMDS venture, also holds options to acquire additional equity of up to eighty percent more, the investor's ability to affect the competitive nature of the venture would not be significantly different than if it had direct control.

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[4] *Id.* at 12617-18, ¶ 163 (footnote omitted).

[5] *Id.* at 12622, ¶ 173.

[6] *Id.*

[7] *Id.* at 12623, ¶ 175 (footnote omitted).

[8] *See* 47 C.F.R. § 101.1112(h)(5) (1997) ("Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern.").

Finally, the fact that the eligibility restriction is subject to a three-year sunset[9] heightens my concerns. The operation of this sunset in conjunction with the nonattribution of these financial instruments could increase the possibility that incumbents will acquire and use them to frustrate our competitive goals.

My concerns about the operation of the attribution rules that apply to the eligibility restrictions we have crafted for LMDS reflect a more general concern about the inconsistencies that exist with respect to our attribution rules across services. Therefore, I am pleased that this Order commits us to opening up a general rulemaking on attribution later this year. The Commission has already opened up a rulemaking on various attribution issues relating to licenses regulated by the Mass Media Bureau, raising questions regarding the treatment of debt and convertible instruments.[10] I look forward to the more comprehensive review discussed in this Order.

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[9] *Second Report & Order*, 12 FCC Rcd at 12633, ¶ 198.

[10] *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rule Making, 11 FCC Rcd 19895, 19899-908, ¶¶ 8-25 (1996).

**Separate Statement**
**of**
**Commissioner Susan Ness**

*Re: Local Multipoint Distribution Service (LMDS). Third Order On Reconsideration.*

The Local Multiple Distribution Service (LMDS) offers an extraordinary -- and perhaps unique -- opportunity to create competition to incumbent providers of cable and local telephone service. LMDS is a broadband wireless service that offers significantly greater capacity for each licensee than any other wireless service available today. With bandwidth of 1,150 megahertz for a single license, operators will be able to provide consumers a wide array of wireless interactive voice, video, and data services. There is also sufficient capacity to offer hundreds of channels of video programming as well as internet connections at megabit speeds.

***Ownership Exemption***

But these opportunities required tradeoffs. The FCC was able to free up only enough spectrum to assign one large and one small license for each geographic area. Achieving the pro-competitive and deregulatory goals of Congress requires that cable and telephone companies not be permitted to control the single large LMDS license in those areas where they already wield market power. Recognizing the antitrust implications inherent in creating a single license of such capacity, we limited initial eligibility for the large license to those entities not already serving the same geographic area with competing cable or wire offerings. Such entities may hold LMDS licenses elsewhere; just not where they already have a dominant market position. This is a narrowly tailored restriction designed to spur much-needed local competition.

We further limited this restriction by providing that it would sunset three years after its adoption. We adopted the sunset provision under the assumption that competition would grow in the delivery of services by cable and wire. However, given how slowly competition has developed in video and local telephone services to date, it is unclear today whether three years is adequate to assure that video and wireline telephone services will be provided in a fully competitive marketplace. I certainly hope that it will be.

Our rules and regulations should be crafted to reflect *actual* marketplace conditions -- not our hopes and expectations. Therefore I endorse the provisions of this Order establishing a mechanism for us to review our ownership restrictions on LMDS and, based on factual assessments of marketplace competition, to decide whether the rules should expire.

***Attribution***

I share the Chairman's concern regarding application of our attribution rules to the three- year in-market ownership restriction for incumbent telephone and cable television companies. Under the original order, our restriction would be thwarted if a cable company or carrier company acquired an *unattributable* interest in an LMDS property through warrants or convertible debentures that are outstanding but not yet exercised.

But, because of the immediacy of the scheduled auction, I am loathe to change the eligibility rules at this time. To change them at the eleventh hour would create marketplace uncertainty and harm companies whose plans to participate in the auction have long been set.

We should, however, carefully review our attribution rules in all our services. But I caution that a "one rule fits all" approach may not be advisable. There may be important service distinctions at the heart of differing attribution rules. There may be different expectation interests pertaining to arrangements that have been predicated on our existing rules. These considerations should be examined for their ongoing relevance.

***Spectrum efficiency***

Finally, I am pleased that we are permitting several state and local governments -- including Nevada -- to use their existing traffic control equipment on a secondary basis in a small portion of the LMDS spectrum, until conflicting LMDS operations commence. Such an accommodation will allow the spectrum to be used, instead of left vacant, during the interim period while LMDS systems are being licensed and constructed. It also will give localities more time to migrate to other spectrum or find other ways to control their traffic light systems at low cost.

**SEPARATE STATEMENT OF**
**COMMISSIONER HAROLD FURCHTGOTT-ROTH**
**DISSENTING IN PART**

*Re:* *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services.*

*Petitions for Further Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules.*

I support much of today's Third Order on Reconsideration, and I am excited about the opportunities that this spectrum will provide to entrepreneurs to provide new and innovative services to the public. In addition, I look forward to additional competition in the local telephone and multichannel video programming markets that these new services may provide. I must take issue, however, with the Commission's decision today to initiate a separate proceeding to determine whether or not we will allow the eligibility restrictions to sunset on June 30, 2000 as originally promised.

In the Second Report and Order, the Commission imposed a temporary but severe eligibility restriction on incumbent LEC and cable operators. I fully agree with Commissioner Chong's Dissent in that Order, in which she pointed out the speculative nature of the harms this restriction was trying to prevent. Eligibility restrictions on an innovative new service are a draconian measure; such bans on competition should be used only to prevent a substantial competitive harm to a specific market. Here, the eligibility restrictions are imposed not to prevent a specific harm, but in an attempt to enhance the mere possibility of competition. As Commissioner Chong correctly pointed out in her Dissent, "by precluding the participation of incumbent LEC and cable operators, competition in these markets may well be harmed by arbitrarily denying some of the strongest competitors the ability to branch out into new markets." Despite these concerns, however, the Commission adopted these restrictions based on the notion that restricting eligibility for a limited time would enhance competition.

I am gravely concerned by the Commission's decision today to revisit the current sunset date of the restrictions. I believe there is no need for these restrictions at all. If there must be restrictions, I certainly support the intended sunset of these provisions. Instead, prior to this auction even taking place, the Commission has already decided that it will be necessary to undertake an extensive evaluation of the effectiveness of the restrictions on mere speculative harms. I am unclear as to why six months in 2000 would not provide sufficient time to review a provision that we have already indicated should be temporary in nature, and if such a time frame is infeasible, why we should not address the provision in this year's requisite biennial review. Indeed, any review should take place in conjunction with the 1998 biennial review of all the Commission's rules under Section 11 of the Communications Act.

In defending this restriction before the D.C. Circuit recently, this Commission argued that "the FCC premise, again, is that you gain competition by excluding the big players temporarily." *Communications Daily*, January 20, 1998 Vol. 18, No. 12 (emphasis added). The Court expressed its appreciation for the context that this statement added, pointing out that it added a certain "richness to the argument." *Id.* Similarly, I believe that the Commission's decision today, -- i.e. to open an extensive review of the restriction, to conduct that review outside of the biennial review process where the Commission is attempting to find rules that it can eliminate, and to require that the results of that study be presented to the Commission more than a year before the restriction is to sunset -- likewise provides context and a certain "richness" to the Commission's claims regarding the temporary nature of this restriction. I fear that the Commission is headed in the wrong direction in attempting to build a record to keep these restrictions in place and therefore must respectfully dissent from that section of today's Third Order on Reconsideration.

## SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL

Re: Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Establish Rules and Policies for Local Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Third Order on Reconsideration.*

I strongly support the decision today to reject the remaining arguments raised by the petitions for reconsideration of the Local Multipoint Distribution Service ("LMDS") eligibility rules. I look forward to a successful auction for this new, innovative service beginning February 18, 1998. More importantly, I look forward to the rapid licensing of the winning bidders and to LMDS licensees providing an important, potential source of competition in the local telephone and multichannel video programming markets. I also anticipate with excitement the release of this much desired "bandwidth" for commercial use by existing and entrepreneurial firms hoping to cash in on the Internet access market and any other applications that they can dream up.

However, I write separately to express concern over two issues addressed in the item -- both of which are not decisionally significant to its outcome -- that I fear will cause unnecessary consternation in the developing LMDS marketplace.

**Eligibility Restrictions and Three-Year Sunset**

The three-year limitation on incumbent local exchange carriers' ("LECs") and cable operators' participation in LMDS illustrates a trend that greatly troubles me. In the zeal to promote competition, we regulators sometimes champion as "procompetitive" policies, which in reality, take solace in the shadows of highly speculative fears about market power and anticompetitive conduct. We too glibly assume that a large company with significant resources and market power in one market is a threat to robust competition in an entirely different -- and often yet developed -- market. We rush to prospectively protect other competitors from this perceived enemy of free and open competition, often with little to substantiate our fears. Indeed, it may be that proven companies are just the animals to create new innovative markets and usher in competition in those markets to the benefit of consumers.

I would prefer to see policies that are less protective and more procompetitive. Procompetitive policies are ones that remove barriers to entry for all potential entrants and level the playing field as much as possible. Procompetitive policies (as opposed to enforcement actions) should not be ones that handicap one class of competitor. When we adopt such policies, we do not really promote competition, we pick winners -- a job for the marketplace. I therefore share the views expressed so eloquently by Commissioner Chong in

her dissent to the *Second Report and Order* in this proceeding.[1]

With this in mind, I note that this item correctly rejects petitioners' arguments to expand the current restriction on participation by LECs and cable operators. I am uneasy, however, about the item's alert that a staff-level review of the relevant markets will be commenced a year before the restriction is set to sunset in the year 2000 to evaluate whether the Commission should extend the sunset date. Although I support full disclosure of our intentions and processes in conducting such a review, I hope this does not send the wrong message about the viability of the sunset rule.

I would not be inclined to keep the LECs and cable operators caged up and extend the sunset period except upon a convincing showing of proven or probable anticompetitive conduct. LMDS is a nascent and broadly defined wireless service. Under the very flexible build-out and service rules, licensees will be capable of using the spectrum for wireless telephony, broadband video and data, or something else that we have not even thought of yet. In all likelihood, these new licensees will be a powerful source of competition to incumbent LECS and cable operators in their service areas. Indeed, LECs may use LMDS to provide competition in the MVPD market and cable operators may use LMDS to provide competition to incumbent LECs -- but, for now, not in their own markets. There is no guarantee of such competitive promises, nor do I foresee convincing justification at this time to extend this entry barrier any longer than absolutely necessary. It makes some sense to give new entrants a temporary head-start and to impose short-term and geographically constrained limitations on LEC and cable entry, but anything more, in my view, would require convincing evidence and analysis of competitive harm. I feel strongly that in this new, rapidly developing marketplace we should not presume to know which competitors will succeed and in what way these new and innovative services will be best brought to consumers.

**Comprehensive Review of Ownership and Attribution Rules**

In rejecting petitioners' calls to modify the LMDS ownership attribution rules, this item announces that the Commission will undertake a comprehensive reevaluation of the various ownership restrictions and accompanying ownership attribution rules for all services. I applaud this announcement and look forward to a broader review of these rules with a watchful eye toward (1) eliminating restrictions on ownership and investment that are no longer necessary and (2) ensuring uniformity, certainty, rationality and flexibility in those rules that are absolutely necessary to retain. I also note that this type of review is mandated by the 1996 Telecommunications Act, in which Congress also anticipated modification or

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[1] *See Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 12 FCC Rcd 12545, 12802 (1997) (Statement of Comm'r Chong Dissenting in Part).

repeal of ownership regulations that are no longer necessary in the public interest.[2] While I do not expect any changes to the current LMDS ownership rules, I wish to echo the item's wise and thoughtful proclamation of certainty that any such changes will be applied prospectively only and shall not affect the LMDS applicants' business plans.

[2] Pub. L. 104-104, §§ 202(h), 402(a), 110 Stat. 112, 129 (1996).